

Letter of Findings Number: 09-0609
Sales Tax
For Tax Year 2006 and 2007

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ISSUES

I. Sales Tax – Delivery Charges.

Authority: IC § 6-8.1-5-1; IC § 6-2.5-1-5; IC § 6-2.5-2-1; IC § 6-2.5-4-1; Lafayette Square Amoco, Inc. v. Indiana Dep't of Revenue, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007).

Taxpayer requests waiver of sales tax on delivery charges.

II. Tax Administration - Negligence Penalty.

Authority: IC § 6-8.1-10-2.1; [45 IAC 15-11-2](#).

Taxpayer protests the imposition of a ten percent negligence penalty.

STATEMENT OF FACTS

Taxpayer is an Indiana corporation. Taxpayer is a sales distributor of factory automation products which are assembled from parts purchased from other suppliers. Taxpayer builds these assemblies, paints them and sells them under its name. The Indiana Department of Revenue ("Department") conducted an income tax audit of Taxpayer and made no adjustments. The Department audited Taxpayer for sales and use tax and found that Taxpayer owed additional sales tax. Taxpayer protested part of the base tax assessment and the penalty. A hearing was held and this Letter of Findings ensues. Additional facts will be provided as necessary.

I. Sales Tax – Delivery Charges.

DISCUSSION

The majority of the Department's proposed sales tax assessment related to freight charges for which Taxpayer did not collect sales tax from its customers.

The Department notes that all tax assessments are presumed to be accurate and the taxpayer bears the burden of proving that any assessment is incorrect. IC § 6-8.1-5-1(b),(c); Lafayette Square Amoco, Inc. v. Indiana Dep't of Revenue, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007).

IC § 6-2.5-2-1 imposes sales tax on retail transactions made in Indiana:

- (a) An excise tax, known as the state gross retail tax, is imposed on retail transactions made in Indiana.
- (b) The person who acquires property in a retail transaction is liable for the tax on the transaction and, except as otherwise provided in this chapter, shall pay the tax to the retail merchant as a separate added amount to the consideration in the transaction. The retail merchant shall collect the tax as agent for the state.

IC § 6-2.5-4-1 states:

- (a) A person is a retail merchant making a retail transaction when he engages in selling at retail.
- (b) A person is engaged in selling at retail when, in the ordinary course of his regularly conducted trade or business, he:

- (1) acquires tangible personal property for the purpose of resale; and
 - (2) transfers that property to another person for consideration.

- (c) For purposes of determining what constitutes selling at retail, it does not matter whether:

- (1) the property is transferred in the same form as when it was acquired;
 - (2) the property is transferred alone or in conjunction with other property or services; or
 - (3) the property is transferred conditionally or otherwise.

- (d) Notwithstanding subsection (b), a person is not selling at retail if he is making a wholesale sale as described in section 2 of this chapter.

- (e) The gross retail income received from selling at retail is only taxable under this article to the extent that the income represents:

- (1) the price of the property transferred, without the rendition of any service; and
 - (2) except as provided in subsection (g), any bona fide charges which are made for preparation, fabrication, alteration, modification, finishing, completion, delivery, or other service performed in respect to the property transferred before its transfer and which are separately stated on the transferor's records.

For purposes of this subsection, a transfer is considered to have occurred after delivery of the property to the purchaser.

- (f) Notwithstanding subsection (e):

- (1) in the case of retail sales of gasoline (as defined in [IC 6-6-1.1-103](#)) and special fuel (as defined in [IC 6-6-2.5-22](#)), the gross retail income received from selling at retail is the total sales price of the gasoline or special fuel minus the part of that price attributable to tax imposed under [IC 6-6-1.1](#), [IC 6-6-2.5](#), or Section

4041(a) or Section 4081 of the Internal Revenue Code; and

(2) in the case of retail sales of cigarettes (as defined in [IC 6-7-1-2](#)), the gross retail income received from selling at retail is the total sales price of the cigarettes including the tax imposed under [IC 6-7-1](#).

(g) Gross retail income does not include income that represents charges for serving or delivering food and food ingredients furnished, prepared, or served for consumption at a location, or on equipment, provided by the retail merchant. However, the exclusion under this subsection only applies if the charges for the serving or delivery are stated separately from the price of the food and food ingredients when the purchaser pays the charges.

(Emphasis added).

Also, IC § 6-2.5-1-5 defines "gross retail income" and states in relevant part:

(a) Except as provided in subsection (b), "gross retail income" means the total gross receipts, including cash, credit, property, and services, for which tangible personal property is sold, leased, or rented, valued in money, whether received in money or otherwise, without any deduction for:

(1) the seller's cost of the property sold;

(2) the cost of materials used, labor or service cost, interest, losses, all costs of transportation to the seller, all taxes imposed on the seller, and any other expense of the seller;

(3) charges by the seller for any services necessary to complete the sale, other than delivery and installation charges;

(4) delivery charges; or[...]

(Emphasis added).

Therefore, based on the above, there is no question that Taxpayer's freight charges were part of the retail transaction and therefore subject to sales tax and that Taxpayer was required to collect those taxes. Taxpayer does not dispute that the freight charges are subject to sales tax. However, Taxpayer argues that during the period at issue, it was not aware that in 2004 the law clarified that delivery/freight charges were subject to sales tax. Taxpayer argues that it did not receive any notification from the Department of this change. Taxpayer states that it checked with third parties in similar businesses and found that they, too, were unaware of the requirement to charge sales tax on delivery charges. Taxpayer checked with the software company from which it purchases sales tax software and was told that the software company was unaware of any requests to include freight charges in the retail sales subject to sales tax. Taxpayer asks what venue it would have had to learn of this tax change. Taxpayer states that within two days of being informed by the auditor that it should be collecting sales tax on these delivery charges it had amended its computer programs and began doing so. Given these circumstances, Taxpayer requests that the Department waive this assessment.

Taxpayer is a long-established business and should be aware that it is its obligation to be current with sales and use tax laws and any other laws that could impact its business. It would be administratively impossible for the Department to inform every business of every change of law that might impact it. It is the duty of every taxpayer to keep abreast of the changes in the law, especially if one is a retail merchant and expected to collect sales tax.

FINDING

Taxpayer's request that the assessment of sales tax on delivery charges be waived is respectfully denied.

II. Tax Administration - Negligence Penalty.

DISCUSSION

The Department issued proposed assessments and the ten percent negligence penalty for the tax years in question. Taxpayer protests the imposition of penalty. The Department refers to IC § 6-8.1-10-2.1(a), which states in relevant part:

If a person:

...

(3) incurs, upon examination by the department, a deficiency that is due to negligence;

...

the person is subject to a penalty.

The Department refers to [45 IAC 15-11-2](#)(b), which states:

Negligence, on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence would result from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations. **Ignorance of the listed tax laws, rules and/or regulations is treated as negligence.** Further, failure to read and follow instructions provided by the department is treated as negligence. Negligence shall be determined on a case by case basis according to the facts and circumstances of each taxpayer.

(Emphasis added).

[45 IAC 15-11-2](#)(c) provides in pertinent part:

The department shall waive the negligence penalty imposed under [IC 6-8.1-10-1](#) if the taxpayer affirmatively establishes that the failure to file a return, pay the full amount of tax due, timely remit tax held in trust, or pay a deficiency was due to reasonable cause and not due to negligence. In order to establish reasonable cause,

the taxpayer must demonstrate that it exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed under this section.

By the terms of [45 IAC 15-11-2](#)(b), ignorance of the law is considered de facto negligence, and is, therefore subject to penalty under IC § 6-8.1-10-2.1(a). However, given Taxpayer's otherwise generally good history of compliance, the negligence penalty is waived on a one-time basis.

FINDING

Taxpayer's protest of the negligence penalty is sustained.

CONCLUSION

Taxpayer's request that the sales tax on freight charges be waived is respectfully denied. However, Taxpayer's protest of the negligence penalty is sustained.

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